IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

EASTERN DIVISION

IN RE: FIRSTENERGY CORP. SECURITIES LITIGATION	CIVIL ACTION NO. 2:20-cv-3785

THIS DOCUMENT RELATES TO:

ALL ACTIONS.

TRANSCRIPT OF REMOTE PROCEEDINGS

BEFORE SPECIAL MASTER SHAWN JUDGE

THURSDAY, JANUARY 4, 2024

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PAGES 1 - 79

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REPORTED REMOTELY FROM IRVINE, CALIFORNIA;
THURSDAY, JANUARY 4, 2024, 8:04 A.M. TO 9:43 A.M.

SPECIAL MASTER JUDGE: It is January 4th, 2024, 11:05. We're here in the FirstEnergy case, 2:20-cv-3785; as well as the MFS Series Trust I litigation, Case No. 221-cv-5839; and Brighthouse Funds Trust II litigation, Case No. 2:22-cv-865, before the Special Master by reference for report and recommendation as to motion for a stay pending the interlocutory 26(f) appeal. The motion for a stay is by FirstEnergy.

Counsel, if you would introduce yourselves and then move into it. The floor will be yours.

MR. GIUFFRA: Okay. Good morning, Special Master Judge. Robert Giuffra with Sullivan & Cromwell for the Defendants.

MR. FORGE: Good morning. This is Jason Forge for the Class Plaintiffs.

MR. HEIMANN: And good morning, your Honor. Richard Heimann for the Opt-Out or Direct Action Plaintiffs.

SPECIAL MASTER JUDGE: Thank you, all, and welcome.

Mr. Giuffra, whenever you're ready.

MR. GIUFFRA: Okay. Mr. Judge, as I think it's been laid out in the papers fairly well, the grant of a 23(f) interlocutory appeal is a significant step in any securities case. In fact, it's a rare step. And that's Plaintiffs' own words in opposing the grant in this case.

Now, we went back and looked, and the Sixth Circuit has granted 23(f) appeal and securities cases four times in the last ten years, including in this case.

In the three other cases, besides this case, District Courts granted stays of those cases, including Magistrate Judge Jolson, because of the significant implications of a 23(f) appeal.

Now, it's quite clear that the 23(f) appeal in this case could significantly change the shape of the case. We provided you with copies of our petition, the opposition briefs, the reply, as well as the amicus briefs that were filed by prominent law professors and SEC officials.

There are two claims in this case. The most significant claim, clearly, is the Section 10(b) fraud claim the Plaintiffs had brought under the Exchange Act on behalf of stockholders in FirstEnergy. The Court certified a class for three-and-a-half years and

Plaintiffs claim approximately $8 billion in losses over that three-and-a-half-year class period.

The other claim that remains in the case is a Section 11/Section 12 case under the Securities Act and it's on behalf of bondholders. That claim has completely different standards that need to be shown. For example, you've got to show scienter in a 10(b) case. No scienter obligation in a bondholder Section 11/Section 12 case, just a material misstatement.

The class period in the bondholder case is only -- is less than a year, and the losses are, at most, about $200 million.

Now, the 23(f) petition goes directly at the 10(b) case, the 10(b) claims. And that's, again, if the -- if the Sixth Circuit rules the way we think it should, as laid out in our petition, there won't be a 10 -- a Section 10(b) case in this case. It'll be dismissed. Well, there'll be no class that will be certified.

They may get the chance to remand back to the District Court, try to file another class certification motion. There have been other cases we've been involved in with Mr. Forge's firm. This has gone on literally three times.

But there may not be a certifiable 10(b) case following the motion that we have made -- the application we have made. And with a 10(b) case, the Plaintiffs have to prove class-wide reliance. They've got to show that all of the stockholders in the class relied upon the alleged misstatements or omissions.

Now, in order to establish reliance in a securities case, the Supreme Court has adopted two presumptions. One is something called Affiliated Ute, which we talk about in our papers, and the other is Basic.

In most securities cases involving public companies -- in fact, all that I'm aware of -- Courts rely upon the Basic presumption.

Now, here Plaintiffs have alleged -- and I was glad that Mr. Forge put the brief in front of -- put it before you -- the complaint before you last night. They principally allege that Defendants did not disclose they were engaged in a political corruption scheme.

They also allege approximately 42 -- I think it is 42 -- misstatements and they -- those statements -- you know, is a different case. You don't have to rely upon Basic.

Now, it's a lot easier to establish and to certify a class based on Affiliated Ute than under

Basic. There are different standards, and those standards are much harder to -- to meet.

Now, we've raised both the question of whether Plaintiffs can rely upon Affiliated Ute and Basic in certifying a class in this case and whether they can have a claim that's based on the nondisclosure of this alleged political corruption scheme. We don't think they can do that. Seven Courts of Appeals have gone our way. The Sixth Circuit has not addressed this issue at all. In fact, there have been -- you know, there have been cases where the Sixth Circuit, prior to this case, had denied 23(f) petitions in securities cases seeking review of this question of whether Affiliated Ute and Basic can be applied in the same case.

Chief Judge Marbley, in his class certification order, recognized that this was a question that had not been decided by the Sixth Circuit and it's an important legal question. And clearly, the Sixth Circuit, you know, is going to review that issue.

The second issue that we presented in our petition is equally important and perhaps more so. The Supreme Court in the case called Comcast -- it's a relatively recent Supreme Court case -- said that Plaintiffs must be able to propose a damages methodology that is capable of measuring damages on a class-wide

basis.

One of the issues in this case is that, over the three-and-half years, if you just look at the 42 misstatements, different misstatements were made at different times. And what the misstatement was or wasn't had different effects. Because when you're dealing with something -- you know, in the typical securities case, if a company says, well, we're going to have, you know, a billion dollars in earnings and they announce that the stock price goes up, and then it turns out that it was a bankrupt company and the stock price goes down, it's pretty easy to assess what the impact was of the misstatement.

In a case like this, when Plaintiffs are relying upon statements like "we endeavor to comply with the law" and the issue is, well, you didn't disclose you were engaged in purported corruption conduct at various points in time. Obviously, what was going on at different points time was -- were different.

So, for example, if you just take the facts of this case, the fact that, you know, FirstEnergy was providing political contributions to Mr. Householder before he became a speaker of the -- of the Ohio house, was, obviously, something that would have had less of an impact on the stock price than, for example, if he was

the speaker, which happened later on, or if HB6 was passed or if the repeal was going to happen.

So the inflation in FirstEnergy's stock price was different, varying over the course of the three-and-a-half-year class period. And the statements themselves were what I would call qualitative misstatements; meaning, they weren't statements going to financial metrics, but they were going to statements about what the company was endeavoring to do in terms of things like legal compliance.

And trying to measure the amount of inflation in the stock price because of such qualitative statements in the context of an alleged political corruption scheme over three-and-a-half years is quite different than being able to, in a financial misstatement case, look at, well, what was the statement that was made with respect to earnings? The stock price went up ten points. Then it turned out the earnings were not going to be hit, stock price went down ten points. That's a much simpler methodological problem for a damages expert.

Now, in this particular case, what happened was the Plaintiffs submitted what we call a cookie-cutter expert report from another case where, in fact, I believe that the class cert wasn't even -- it -- there

were issues with respect to class cert in that case, where the expert basically identified a series of methodologies that could be used to measure damages in a securities case.

The expert didn't attempt to propose a methodology that would apply in this case. They didn't even pick a particular methodology that he would apply. Now, he promised, at some point down the road, he could do so. Now, Chief Judge Marbley in his decision, did not apply Comcast. He didn't engage in the rigorous analysis that was required by Comcast. And instead he thought that, well, since, under the Securities Act, there was a statutory formula for calculating damages and the expert was going to be applying that statutory formula in calculating the bondholder damages, that same methodology could be applied in this case, in the -- in the stockholder case.

In fact, there is no statutory damages methodology under the Exchange Act. And, you know, I think this was clear. The fact that the damage -- the expert did not propose a damages methodology that worked or the fact that Chief Judge Marbley didn't do the required analysis or the fact that there is no statutory damages method proposed -- laid out in the -- in the Exchange Act for 10(b) claims --

SPECIAL MASTER JUDGE: Let me ask you this: Is there a methodology that's capable of measuring the claim damages here?

MR. GIUFFRA: We don't know. It hasn't been proposed. And, in fact, that's the issue that the Sixth Circuit will have to decide. And if the Sixth Circuit agrees with us, that what Plaintiffs have done in this case is not sufficient, the case will be sent back to Chief Judge Marbley. I assume the Plaintiffs will have an opportunity to try to propose a damage methodology that works in the complicated case that we're dealing with about qualitative misstatements over a three-and-a-half-year period involving, you know, different kinds of political activities. Because, as we all know, you know, obviously, someone could be running for office, but when they get in office and if you're paying them bribes, it has a different value in terms of the benefit that you can get. And if someone is trying to get a bill passed -- right -- it's not certain it's going to happen. And if the bill gets passed, then there's repeal attempt.

So all those events had different inflationary effects on the stock price. Plaintiffs have not taken any of that into account and have not proposed a damages methodology that works. So --

SPECIAL MASTER JUDGE: Can you point me to any Court that's ever applied this kind of inflationary theory?

MR. GIUFFRA: Yes. I believe we cite them in our papers. There are multiple cases where Courts have held that classes cannot be certified because the Plaintiff have -- has not been able to put forward a damages methodology that can measure damages on a class-wide basis. So it's something that Courts have done and the Sixth Circuit is going to look at the allegations in this case and make an assessment.

So if the Sixth Circuit agrees with us and remands the case back down, there won't be a Section 10(b) case, which is the main case we're dealing with here, where all the discovery is being taken, where we're going to purport -- you know, start planning for expert reports, and there may not be a Section 10(b) case at all here. And so --

SPECIAL MASTER JUDGE: Explain to me why subclasses wouldn't work. I mean, if we're going to look at this as a component of damages depending upon the position of Householder at the time and his influence at the time and everything, why isn't that ripe for breaking it down into compartmentalized approach?

MR. GIUFFRA: That's something that would have to be assessed following a remand by the Sixth Circuit, by Chief Judge Marbley. The Plaintiff would have to able to come forward with a damages methodology that works for a subclass. The subclass, obviously, would be a much smaller class with smaller damages than in this case. The economic stakes would be lower. So when you look at things like, you know, what are the stakes in the litigation and what discovery should go forward, we look at it differently. We don't know.

And, look, we raised these issues on class certification. The Plaintiffs went forward with what was a cookie-cutter, basically, just listing of different methodologies that can be used to assess damages in security cases. They did not do the work that was necessary, did not reflect the issues in this case, the difficulties of this case.

This is not a case like, say, Enron or Worldcom, like I said at the beginning, where a company makes a financial misstatement about its earnings and it turns out it's not true. You can see exactly how much the stock price went up when they made the full financial disclosure and how much it went down when it turned out the truth came out. That is not this case. It's a much more nuanced case. And in those types of

cases, you've got to do the work and it was not done.

Another issue that will happen in this --

SPECIAL MASTER JUDGE: Explain to me, though, because, I mean, what's before the Sixth Circuit, they're going to look at whether certification was appropriate and whether it needs to be remand -- you know, decertification on a remand.

You know, I assume they would not extend beyond decertification, because it's not really before them, where they would say there is no methodology. They're not going to opine on that ultimate issue.

I mean, you're -- this is a convoluted question. So let me try to ask it in two parts, and you can address either one first. The takeaway from -- one of the takeaways from all the briefing is -- I think Mr. Forge would call it hyperbolic. I call it just unfinished or not flushed out enough.

You had some conclusory statements of, you know, some of the Defendants are likely to get tossed out of the case. You know, they're -- yeah. I -- I'm not so certain that you've given me the analytic cane for each of those conclusions. So perhaps --

MR. GIUFFRA: All right. Let me try to do that.

SPECIAL MASTER JUDGE: And here's the other

component to that. As part of that same -- let's assume you're absolutely right -- and I'm not expressing an opinion -- we're just assuming for the sake of argument that you're absolutely right, then the remedy in the Sixth Circuit is decertification and remand, I'm assuming. You're not suggesting that they're going to say certification is impossible because there is no methodology. I think that would be going beyond what's in front of them.

MR. GIUFFRA: I think that's correct. But I think the -- but the issue would then be, okay, there would be no class. All the discovery that's being taken, you know, first based on our Affiliated Ute theory that we think will be thrown out. All the discovery that's being taken based on the claim that while why they can -- there -- the judge didn't do the proper Comcast analysis.

And so, you know, what we're basically saying is you've got to pause the case because the -- whether there is a certifiable Section 10(b) case in this case is now being called into question. And until, you know, the Sixth Circuit rules -- the Sixth Circuit rules however it rules, if they remand and send the case back, there won't be a cert -- a Section 10(b) claim. If we won on both grounds, it will be decertified.

And then Plaintiffs will have to try to get a case certified before Chief Judge Marbley. He may or may not agree with them. We would have the ability again to bring another 23(f) case. There have been -- I can give two examples. One of which I was involved in with Mr. Forge's law firm involving Goldman Sachs. We went -- had three 23(f) appeals, including one that went to the US Supreme Court. And the Halliburton case, which also went to the Supreme Court, there were three 23(f) appeals.

These securities cases are complicated and this is one where -- and in each of those cases, discovery was stayed, pending the 23(f) appeals.

So what we're saying here is that, even on a remand, Chief Judge Marbley would have to reassess all the issues related to class certification, which would be -- if they're trying to move on, on the basis of misstatements at that point, there are issues related to whether the statements had any price impact, whether the statements match up, the statements with the corrective disclosure. The only corrective disclosure they point to is the fact that there was disclosure of the Householder indictment. Well, that's different than those statements and whether the statements were or were not accurate.

Now, because of the significant impact of a 23(f) on a securities case -- and, again, this is only the fourth one that the Sixth Circuit has granted in ten years, and in every one them, District Courts -- the other three, District Courts have stayed discovery, including Magistrate Judge Jolson, in the Big Lots case. And Courts have stayed discovery irrespective of the status of the case. Was it a fact discovery, expert discovery -- they stayed it.

Now, Plaintiffs put up a bunch of cases, and I want to just talk about them briefly. They cited six cases where parties moved to stay discovery, but no 23(f) petition had been granted. They moved in the District Court to stay discovery.

I would -- if we had moved in the District Court before either you or before Chief Judge Marbley, you would have denied it. You would have said we don't know whether the -- we don't know whether you have a strong or weak 23(f) petition. In Chief Judge Marbley's view, it would be, "I think my class certification decision is correct."

Of the six cases that they cite, in the one case, which is called Daniels, which is a Second Circuit case, District Court denied the stay before the 23(f) petition was granted. But then when the 23(f) petition

was granted, the case was stayed.

Plaintiffs cite a case called Petrobras, another Second Circuit case that I'm quite familiar with. The District Court denied the stay, but then the Second Circuit granted the stay following the grant of the 23(f) petition. And then the other two cases that the Plaintiffs cite are not even 23(f) cases, much less securities cases.

So the standard for a stay -- there are four factors that need to considered, and I'll just tick through them quickly. The first one is likelihood of success.

Now, that requires a showing only that an appeal raises, quote, "serious questions going to the merits." And we cite that case, Abercrombie. It's a Southern District of Ohio case for that proposition.

Well, the Sixth Circuit in this case has already recognized that there are serious questions going to the merits by granting the petition. In fact, in its order, the Sixth Circuit said that, you know, it had considered, quote, "whether the Petitioner is likely to succeed on the appeal," close quote. And, also, quote, "whether the case presents novel or unsettled questions of law," close quote.

So that's the one thing we know. We know

that's what was considered by the Sixth Circuit in granting the petition. And clearly, that's sufficient to meet the serious questions going to the merits standard. And, again, the questions here are serious questions that could lead to the decertification of the 10(b) case entirely. And that -- and so, you know, if Plaintiffs can't satisfy Comcast, there won't be a Section 10(b) class action case. The alleged losses will just be those under the bondholder case, which is truly the tag -- the tail wagging a very big dog.

And the Ute -- the Ute ruling will have a significant impact on the scope of the case because Mr. Forge will then have to litigate about each misstatement, the impact of the statement on the price, whether there was loss causation, whether there was scienter with respect to each statement. And that's a different exercise than being able to allege an amorphous nondisclosure of a political corruption scheme. And it's going to be a much harder case to go forward with involving different discovery than what he's dealing with now.

In terms of the balance of harms, favoring a stay, clearly because the Sixth Circuit decision may change the contours of this action, continued proceedings based on theories that may well be thrown

out would be wasteful, wasteful of judicial resources, wasteful of party resources. There are lots of parties on these Zoom calls. There are many parties who go to the depositions. The parties are spending hundreds of thousands, if not into the many millions of dollars, litigating this case. And as in other cases where 23(f) petitions have been granted, it makes good sense to halt the proceedings until we know what the scope of the case will be.

Because, again, class certification is the -- probably the most significant aspect of any securities case. If you can certify a class, you can go forward. If you can't, you can't. And the value of the case for all purposes is affected by your ability to certify a class.

And, again, in Big Lots, Chief Magistrate Judge Jolson recognized that and recognized, as in this case, that the fact that the 23(f) petition could change the contours of the case warranted a stay.

SPECIAL MASTER JUDGE: Let me ask you about -- about the harm issue here. You know, the -- the drain on judicial resources is limited in this case, especially since the appointment of special masters -- special master.

The, you know, impact on the parties fiscally

is the most obvious thing. But if some of the theories fall by the wayside, that, certainly, I think, would affect, arguably, the expert reports. I get that.

What I have a harder time seeing is how much of the fact discovery that could be completed in the interim. You know, it's -- one of the things here that, you know, jumps out at you is to split the baby and, you know, stay expert discovery, wrap up fact discovery. Because the fact discovery, the facts are what the facts are. There's already the risk in demonstrated actual witnesses saying, "I don't remember." And then if we wait another year, we wait another two years, you know, that may only get worse.

So if we permit fact discovery to go forward, but stay the expert component of the case, you know, the theories that are applied to those facts may evolve, may change, my fall away. But the facts are what the facts are. Why should we pause the facts right now when, for the most part, they're going to remain the same and they're going to remain necessary to discovery at some point?

MR. GIUFFRA: That's an excellent question. And let me explain why.

If the Sixth Circuit rules for us on the Comcast issue, then there will be no Section 10(b) claim

in the case. All that will be left will be the Section 11 and the 12 cases. And this, obviously, assumes that they have to go to back in -- they'll go back to Marbley, but -- and then they'll try to certify with a damages expert report.

But right now, if the Comcast -- if we win on the Comcast issue, there will not be a certified Section 10(b) case. If there is only a Section 11 and Section 12 case on behalf of the bondholders and that's all the case is about, it's a completely different case.

So, for example, scienter, fraudulent intent, will not be an issue in the case any longer. It makes -- you know, all the discovery that's going on now is about witnesses and what they knew and what they didn't know. Discovery about state of mind is irrelevant in a Section 11, Section 12 Securities Act claim.

In addition, the class period will be substantially shortened. It's now three-and-a-half years. It will be down to less than a year, if it's just a securities case. Eight of the Defendants in the case, including people who haven't been deposed yet, would be out of the case.

Dozens of the challenge statements that they are focused on now, to the extent they were not made in

the bond offering or prospectus, will not be relevant in the case any longer.

The alleged damages in the case will be limited to the bonds. Nothing else. The market cap loss that they're alleging under -- under the 10(b) case is -- you know, and this is from their complaint Section -- paragraph 258 is $7.6 billion. Under the -- under the -- just the bondholder case, you know, we're probably talking about 200 million. It's a completely different case.

And so from a -- purely from the standpoint of fact discovery, fact discovery on the Section 11 and Section 12 cases will be substantially shorter, substantially more limited, won't involve all the discovery about state of mind and fraudulent intent. And you'll need a lot less discovery.

So our position -- and then -- and then if we are dealing with -- if it's a Ute case, the Ute part of the case is out and it's actually just a case about misstatements, the case will look completely different.

The way Mr. Forge is litigating the case now is to establish that there was a political corruption scheme that was not disclosed and it was known to people inside of FirstEnergy.

Well, if that claim is no longer in the case,

the discovery will have to focus on each one of the statements. And what statements actually get certified for class, if any, will have to be determined after the remand when it goes down to Chief Judge Marbley. And so we would be able to say, well, what's the damages methodology that your expert is proposing for this statement, that statement, and the next statement? Given that some of the qualitative statement -- they're all pretty much qualitative statements about different events at different times, where the inflation was varying. And they haven't put forward any methodology to deal with that.

You're correct that the expert discoveries phase would clearly change, but there's no question that Courts have repeatedly found that conducting wasteful discovery that may not be necessary because a Plaintiff cannot certify a class, because they can't satisfy, for example, Comcast, is something that's -- that meets the balance of harm standard and warrants a stay.

The other thing that, you know, Plaintiffs had focused on a little bit is, you know, well, the fact that the appeal may take some time. We're not rushing the appeal. We haven't sought an extension of our time to file the brief. We still don't know when it'll be done, because there are multiple parties that filed

23(f) petitions and we made a motion to consolidate all those -- all of those appeals so it would be simplified.

But we're -- we -- I can represent to the -- to you and to the Court, we have no intention of delaying, seeking extensions. We're ready to go full speed ahead in the Sixth Circuit.

In addition, in every single one of these, you know, 23(f) grants, there's always a risk that witnesses will -- their memories will fade, but Courts still grant the stays.

And in terms of the public interest, which is the last factor, the public interest is served by correct application of the law, not having a case where we're going to be spending millions of dollars in discovery when the case may not be one that can be certified as a class because the Plaintiff can't propose a damages methodology that satisfies Comcast.

One other point that Plaintiffs raise was, well, we need to have discovery to get the facts out there. Well, the facts about the HB6 scandal are fairly well out in the -- in the public domain. We had Mr. Householder's trial. That was -- that was a public trial. In addition, FirstEnergy, as part of its -- for a prosecution agreement admitted to various facts in its -- in a fact statement. All of that is public.

So what we're urging you to sort of sum up would be this is a significant moment in this case. Under Plaintiffs' own recognition, these 23(f) petitions are granted very rarely or rarely. And in the three other times in the Sixth Circuit in the last ten years, District Courts have recognized that you stop the case. You pause the case. And the issues that we're talking about go directly to whether there's a cognizable, certifiable Section 10(b) claim in this case. And until the Sixth Circuit rules and then it goes back to Chief Judge Marbley and we might be back to the Sixth Circuit, it makes little sense to go forward with a litigation on a 10(b) case that may not be one that can be certified as a class. So we strongly urge that a stay be -- that you recommend a stay be issued here.

SPECIAL MASTER JUDGE: Thank you, sir.

Mr. Forge?

MR. FORGE: Thank you, Mr. Judge. I will try to focus on the actual aspects of this case that point towards the unmistakable conclusion that no stay should be granted. But as I have to do every time after FirstEnergy speaks of rights, I have to correct a few misstatements. Starting with one that Mr. Giuffra has repeated multiple times that the three other 23(f) grants all resulted in the District Court staying

discovery. That is false.

The truth is the three 23(f) grants, over the past ten years in the Sixth Circuit, comprise three cases. In the Big Lots case before Magistrate Judge Jolson, fact discovery had been completed. So there was no stay of fact discovery.

Judge Jolson denied the request to stay written expert discovery which consists of expert reports. So Judge Jolson ordered the expert reports to proceed.

The only thing Judge Jolson stayed was other expert discovery, which, as we all know, would consist only of the expert decisions. So all the fact discovery was complete and Judge Jolson ordered the expert reports to be completed.

In the BancorpSouth case, that's even worse. The discovery was not stayed when a 23(f) petition had been granted. When the case returned to the District Court after the 23(f) had been resolved, on remand, the Magistrate Judge stayed discovery only while the District Court revisited the class certification motion and expressly denied the request to stay discovery pending an appeal in the event that the District Court granted class certification. So the Magistrate Judge refused to prospectively stay discovery pending appeal.

In the third of the three cases, the Tivity

Health case, both fact and expert discovery was complete, and so there really was no choice but for the Court to stay proceedings. Because once there is a certified class, in order for the trial to be binding on everyone, there has to be class notice sent and an opportunity to opt out. So all of discovery had been completed.

So literally not a single one of the cases does what Mr. Giuffra wants you to do, even though he said all of them did what he wants you to do.

Now, I want to move on to another misstatement in FirstEnergy's reply brief and it was also woven throughout Mr. Giuffra's lengthy statement, which essentially read their brief.

At page 12 of their reply --

SPECIAL MASTER JUDGE: Hold on one second, please.

MR. FORGE: Okay.

SPECIAL MASTER JUDGE: As you guys can imagine, I have quite a few documents open here.

MR. FORGE: Well, I will say there's one advantage of the Zoom format, that we can have a lot more landscape in front of us.

SPECIAL MASTER JUDGE: Okay. Please go ahead.

MR. FORGE: Okay. At page 12, about one-third

of the way down the page, they write, "In their omissions case, Plaintiffs must conduct fact discovery focused (as they have done to date) on establishing an amorphous undisclosed corruption scheme that was material and caused investor loss."

Now, in reality, I know Mr. Giuffra has -- I don't think he said a word on the record actually in the discovery in this case. So I don't know if he's actually watched any of the depositions, but for those of us who have actually participated in the depositions and actually taken the depositions, we know that is a completely erroneous characterization.

If you turn to the complaint itself and specifically at page 29, paragraphs 93 and 94, you can see just how deceptive that description is. At page 29, beginning with the heading "The Numerous Methods and Means of Defendants' Bailout Scheme," we have, at paragraph 93 and subparagraphs A through I, all different methods and means of the bailout scheme that don't involve statements at all.

So we have numerous methods and means. And this is all -- for those of us who have prosecuted fraud cases, both civilly and criminally, for our entire careers, there's nothing unusual about this. This is not amorphous, and it's, obviously, disclosed. This is

the way schemes are alleged. You've alleged methods and means of the scheme, you describe those methods and means, and then, at least in the civil case, you take discovery to prove or, in the Defendants' case, disprove those allegations.

So we have nine specifically delineated methods and means that don't involve statements. Then when you turn to paragraph 94, you see in the complaint it says, "In addition to these methods and means, Defendants also executed a bail -- the bailout scheme through a series of materially false and misleading statements, including statements about the following topics."

And what's important there, Mr. Judge, is the combination of materially false and misleading public statements. What you will see throughout this entire complaint is that we have never -- the complaint never says this statement is false. This statement is an omission. It's always all of these statements are alleged to be false and misleading.

There's not a single statement, not one, not a single statement that is alleged in this complaint that will be impacted at all by this appeal. Not even potentially, not a single one.

So you can see examples -- if you turn to page 6 of the complaint, in paragraph 15, it's just a

venue allegation, but we're talking about omissions and false and misleading statements in the same paragraph.

If you turn to page 31, the heading that really begins the description of all the statements, "Defendants' Materially False and Misleading Statements and Omissions During the Class Period," this is a theme that carries on throughout the entire complaint. You can turn to any reference to omission or omit and you'll see misstatement also being alleged, or untrue statement.

The very next page, page 32, Footnote 12, quoting the Sarbanes-Oxley certification, the certification is that the annual report did not contain any untrue statement of material fact or omit to state a material fact necessary to make the statements made in the light of the circumstances on which they are -- under which they are made not misleading. This is throughout the entire complaint.

So this is a completely false representation that the substance of the case will be impacted at all, at all, by this appeal.

SPECIAL MASTER JUDGE: I mean, I think the logical extent in what you're saying to connect the dots is, this is why Chief Judge Marbley said you're either going to have the Affiliated Ute presumption or you're

going to have the Basic presumption.

MR. FORGE: Exactly. And along those lines, Mr. Judge, I'll tell you, there's only one paragraph in the entire complaint that will be impacted potentially by this appeal. That's paragraph 256 at page 95. That's the only one. And because that's the paragraph that alleges the Affiliated Ute presumption. And what Chief Judge Marbley said, in addition to you're either going to have one or the other, was that the damages issue is not going to derail class certification in this case, period. He's going to certify -- if he has to certify just for liability, that's going to happen.

But we're not even close to that point. We're not even close to Judge Marbley having to consider that kind of a scenario, and I submit we're never going to reach that point, because, number one, there's never been a case like this. And they have failed to cite a single one where a class is not certified because the inflation, in the Defendants' view, varies over time. Never happened before.

SPECIAL MASTER JUDGE: Well, I think I tried to ask that of Mr. Giuffra during his argument in a poorly worded question. And he said -- he cited me to a number of cases, the Daniels case, I believe, where he said, you know, yes, they've applied the theory, that the

theory existed.

I take from what you're telling me and from your briefing, it's never been applied.

MR. FORGE: It's never been applied to reject a certified class for damages --

SPECIAL MASTER JUDGE: On the front end --

MR. FORGE: -- because -- because of a claim -- because of a claim that the damages varied over time.

SPECIAL MASTER JUDGE: Yes.

MR. FORGE: And which is their claim.

And let me just give you a quick example to show just how easily this could be done without getting into the nuts and bolts of the methodology.

As Mr. Giuffra mentioned, at the time of the disclosures in this case, there was a market cap drop of approximately $8 billion. What was exposed at that time was that FirstEnergy had effectively become a criminal enterprise. The market cap dropped $8 billion.

That fact that FirstEnergy had become a criminal enterprise was true the first day they started their criminal activities all the way through to the last day.

Even if you say a portion of that drop was probably the market figuring that, down the road, these benefits from HB6 were going to be lost and that is what

varied over time, because the likelihood of getting those benefits varied over time. Before Mr. Householder was the speaker of the house, it was here. Once he was speaker of the house, it was here. Once they passed HB6, it was here. And then once they criminally defeated the referendum, it was up here. So it varies over time. Fine.

The problem with that argument in trying to throw the baby out with the bath water here is that's just a small component of the damages, because the present value of those benefits, as of July 21st, 2020, was not over a billion dollars.

So even if -- even if we ultimately said, you know what, we're not even going to mess with the variable portion of the damages, we're just going to go with the portion that we can see the market took out of this stock price, when it found out that this company had been a criminal enterprise for, you know, the past three years, fine. We're still talking about $7 billion of damages that don't vary over time.

Now, they can make whatever arguments they want, that, oh, it wasn't -- it was a really bad criminal enterprise in 2019, but it was less of a bad criminal enterprise in 2017. That's all argument. That's not a Comcast argument. That's just argument.

We have cases where every day Plaintiffs pursue and obtain damages for pain and suffering. If pain and suffering can be handled -- if a jury can figure out what a dollar value is for pain and suffering, they can easily, especially with the assistance of an expert, do the math in figuring out how the market valued this corruption scheme. Because we know how much value the market took out of FirstEnergy's share price when it was finally exposed.

So what we come back to, once we recognize that, number one, this case is never going away -- and when I say "this case," I mean the entire case. There will be a 10b-5 case, no matter what. There's no circumstance under which there will not be a 10b-5 case going forward.

There is also no circumstance in which the full scope of this 10b-5 case will not go forward. And that's why it's -- it really is an unusual application of the four factors here, because FirstEnergy has absolutely no chance of success if we're measuring the likelihood of success being wiping out or even changing the 10b-5 aspect of this case. They have no chance whatsoever.

Number one, the Class Plaintiffs themselves are not going away. Number two, we have an opt-out or

direct-action case that is a class action itself. They're not going away. Number three, we have the presiding judge in this case of saying not only are -- okay. That's fine. Not only going forward individually, if I didn't certify the class, but I'm going to certify the class, irrespective of damages. That is happening.

So no matter what, the 10b-5 case is going to proceed and it's going to proceed exactly the way it's alleged and exactly the way it has been investigated throughout discovery. That's not going to change. So there's absolutely no chance of saving any money, which the Courts have fairly consistently said is not a form of irreparable harm. And more importantly, this is why FirstEnergy never asked to stay discovery before, because they know it's inevitable.

You see in the BancorpSouth case, which they cite for the, you know, false assertion that the District Court stayed discovery pending a 23(f) appeal, but in that BancorpSouth case, Mr. Judge, the Defendants moved to bifurcate fact and class discovery in its case management order. The Court did not bifurcate. Then they moved to bifurcate fact and class discovery. The Court denied that request. They were consistent in that case of essentially taking the position that the whole

case might get knocked out on this class certification issue, so we shouldn't move forward with fact discovery. They lost, but at least they were consistent.

Here we have FirstEnergy never even raises the possibility of bifurcating discovery. Not in a case management order, not in a motion to bifurcate discovery, not when they oppose class certification, not when they are waiting for Judge Marbley to issue his class certification decision, not after Judge Marbley issues his class certification, not even when they filed the 23(f) petition did they include or request that the Sixth Circuit stay discovery.

That all speaks to the fact that there can't be irreparable harm here, because if there is, then they committed malpractice by not asking to avoid that irreparable harm at any time prior to now.

So it's really just an opportunistic argument. It's not a substantive argument. It's not backed up by the realities of the allegations in this case. It's not supported by the way the fact discovery has been pursued in this case. It's just an opportunistic sound-bite-based argument.

And to drive home that point, I want to point out that, in the rule itself, in 23(f) itself, it expressly states that granting of a petition does not

mean staying the proceedings.

Now, every one of Mr. Giuffra's arguments, when they're actually corrected, every one of his arguments essentially would support staying every case when a 23(f) petition is granted. Yet that is exactly the opposite of what the rule says. The rule says it's not -- every case is not stayed.

I want to -- you know, the very first appellate argument I had as a prosecutor -- the panel asked me a question that I always think about every time when I have an oral argument and -- because it's such a great question, is which one case do you think best supports your position? Which one case?

For us, in this case, I think it's the Beattie case. That is 2006 Westlaw 172207. I think that case best supports our position here for several reasons. First of all, it specifically reminds the parties that Rule 23(f) specifically notes that an appeal does not stay proceedings in a District Court unless the District Judge or the Court of Appeals so orders.

Second, when it talks about whether a substantial question is presented, it talks about whether the -- there's a question presented that could end the case. It's not a substantial question if FirstEnergy has a reasonable likelihood of prevailing on

what is effectively a technicality.

This Affiliated Ute issue -- and Mr. Giuffra is dead wrong when he says that there's six courts or seven courts or any number of courts that have ever held that a mixed case is, per se, not allowed to proceed as an Affiliated Ute case. When I say "a mixed case," I mean a case that alleges both false statements and omissions. What all of the cases say is what is important is whether the case, in essence, is primarily a false statements case or primarily an omissions case.

But either way, they've already conceded that the basic presumption of alliance applies here. So there's no chance that the case is going to go away. And so there isn't a substantial question presented here in the sense of a question that is actually going to impact the discovery we're talking about resuming here, which is what we need to do.

And the second fact of the Beattie case talks about costs not being irreparable harm, and there the only cost that the Court was willing to preserve would be the cost of sending out class notice. And, obviously, we're not going to do that until class certification is finally adjudicated here.

The third, the Court talks about the prejudice to the other side by, you know, delaying resolution. So

that's prejudice to us here, you know, Plaintiffs by delaying resolution. As you accurately pointed out, we've already had instances of memories fading. We've actually had an instance of a witness dying. But, look, do memories fade if you delay proceedings? Of course. Does that mean you cannot, as a rule, stay proceedings? No, it doesn't.

I'm not -- I'm not here to tell you, Mr. Judge, or Chief Judge Marbley, that, you know, you -- it is, per se, improper to stay discovery when a 23(f) petition is filed. But I am here to say that, under these circumstances, we're -- we're already several years down the road from when the case was filed. We're already, you know, well down the road in completing fact discovery. To lose all of that momentum and to wait what is probably going to be a year to resume fact discovery -- that would unquestionably prejudice us.

Does that alone mean it should not be stayed? That alone? Probably not. But it is yet another factor that supports denying the request for the stay.

SPECIAL MASTER JUDGE: That leads into the question I asked Mr. Giuffra about letting fact discovery go forward but staying any expert discovery and expert reports and such. I'm assuming you're going to tell me that's a bad idea.

MR. FORGE: Well, here's -- here's -- yes, your assumption is correct, but here's why. And this is not an instance where, as you, I think, elicited through your questions -- this is not an instance where our expert says damages can be calculated using this methodology and their expert says damages cannot be calculated. And we want the Sixth Circuit to say damages cannot be calculated. That's not the case here.

The case here is our expert says damages can be calculated using this methodology. And they say that's not a -- that's not enough of a description for us to really test it one way or the other.

Maybe they can be calculated. Maybe they can't be, but we don't know enough from this description. Because that is the argument they're making in the Sixth Circuit, and Mr. Giuffra conceded this.

At most, the case is going to come back down for them to get more information about our damages methodology. That is the absolute best-case scenario for them on the contest issue. Most -- most that can possibly happen is we have to provide them with more information. Well, that's exactly what's going to happen if we proceed with the expert discovery.

So -- so that's right. It's not just because I want to get through the expert discovery. It's because

we're actually going to provide the very information they purport to want if we go forward. So there -- there is -- and, you know, the other -- the last thing I want to come back to with the Beattie case is, throughout all of Court's analysis, it emphasizes the fact that the case is going to go forward. The case will still proceed. And that really distinguishes this case from any other in which, you know, there's been a stay of proceedings.

This case is not going away. The Plaintiffs have made it clear in the class case. The Plaintiffs have made that clear in the opt-out or direct-action case, and Judge Marbley has made it clear in his own statements.

And the last component of Beattie which is relevant here is the public interest. And what the Court said there was the Plaintiffs likely have an equal argument that the public interest favors allowing the case to proceed. The Plaintiffs seek to hold a company accountable for deceptive billing practices.

If deceptive billing practices was enough to, you know, get a public interest factor for the Plaintiffs there, clearly in this case, we have a strong public interest in the case moving forward.

You can -- it doesn't take more than 30 seconds

to find an article online in which some reporter is asking why don't we -- you know, why haven't we gotten the full picture of this case? Why don't we know who on the FirstEnergy side is responsible?

We just had Sam Randazzo indicted last month. So the case is far from over just on the criminal side of things. So the public has an extreme interest in this case moving forward and us completing discovery so we can present the public with that complete picture.

And with that, I would -- I would love to answer any questions you might have.

SPECIAL MASTER JUDGE: I think I'm good for now. I may circle back to something. I want to see what Mr. Giuffra says about it on his rebuttal.

MR. FORGE: All right.

SPECIAL MASTER JUDGE: But, no, I appreciate the argument. Thank you.

MR. FORGE: Thank you.

MR. GIUFFRA: Okay. Why don't I start off with the -- with the same point, which is that whether the Section 10(b) claim goes forward or not is not dependent on whether Plaintiffs want it to go forward or whether Chief Judge Marbley wants it to go forward. It's going to depend on what the Sixth Circuit says about whether that claim can go forward. And what Plaintiff did not

dispute was that if they can't come up with a damages methodology that satisfies Comcast, then presumably the Sixth Circuit will say what's required to be a damages methodology that satisfies Comcast. The Section 10(b) case, which is their principal claim, does not go forward.

SPECIAL MASTER JUDGE: Let me stop you right there. If the Sixth Circuit lays out what would satisfy Comcast, you know, the likely avenue is not they're going to say somebody can get it right in the future. They're going to remand it here so these guys can get it right now.

So you're not telling me they're going to -- I mean, on one hand, I think you're telling me they're going to foreclose the claim, 10(b) claims, and they're out. I can't -- explain to me how that's going to happen, because what I see at worst-case scenario for the Plaintiffs -- and do not hesitate to tell me where I'm thinking of this incorrectly -- but worst-case scenario for the Plaintiff is, you know, the Sixth Circuit provides guidance, even in dicta, on what a Comcast methodology would work here, remands it, and then we have guidance for the expert.

MR. GIUFFRA: That's absolutely correct. I agree with you 100 percent. That's -- that's what would

happen in the Sixth Circuit. The Sixth Circuit would say -- it would look at the allegations in this complaint, it would look at the damages methodology that was proposed, which was a, you know, literally off-the-rack just listing possible damages methodology, say it's not acceptable, say what you would need to do in this case. Perhaps. It might not do that much. They might say, look, just what they did was not enough, but they could give some -- they could give some guidance.

It would go back to Chief Judge Marbley. The Plaintiffs would have to make another class certification motion on the Section 10(b) claim. They'd have to come up with a new expert report. We might have to take discovery with respect to that expert report, and then Chief Judge Marbley would have the ability to certify a class. If he certified a class based upon the damages methodology that was proposed, we would have the ability to file another 23(f) petition, and the case could go back up to the Sixth Circuit.

And as I indicated before, there's a case that I was involved in with Mr. Forge's firm that that happened three times in the Second Circuit, the Goldman Sachs case. In the Halliburton case, it happened three times.

But that is the way it would go. I'm not saying that the Sixth Circuit will preclude Plaintiffs from having the ability to certify a Section 10(b) claim. What the Sixth Circuit could do, though, is say what you've done so far is not enough, and decertify the Section 10(b) claim. And what Mr. Forge is saying is, well, let's go forward with discovery like nothing happened, like the 23(f) petition didn't happen.

And, remember, the Sixth Circuit had a choice. It could have just taken the Ute issue, or it could have taken the Comcast issue. It took both issues and said that it assessed -- likelihood of success in granting the petition.

You know, one thing that was said before, which it's just -- and I don't like to say that opposing counsel, you know, is wrong, but with respect to Affiliated Ute, there are literally seven Courts of Appeals that have held you can't have an Affiliated Ute claim based on an undisclosed scheme.

One of those cases, I argued in the Sixth and the Seventh -- in the Ninth Circuit, excuse me -- which was the Volkswagen case. And, you know, while this is, obviously, a big fraud, you know, case and, obviously, there's wrongdoing that was done by people like Householder, et cetera, the Volkswagen emissions case

was clearly a global fraud case. And in that case, what had happened was the company in its -- in its disclosures had not disclosed it was cheating on emissions with respect to cars for, you know, 10 million cars around the world.

The District Court judge, Judge Breyer, actually adopted the same reasoning that Chief Judge Marbley did in this case, but then he certified the issue under 1292 and it went to the Ninth Circuit, and the Ninth Circuit said that, when you have a case which is primarily a misstatement case -- and in that case, there were 50 misstatements. Here we have 42 -- the fact that the claim is that there was a half truth -- i.e., that the statement did not fully disclose all of the facts -- still meant that you could not rely upon Affiliated Ute. And there were other cases like that. I'm quite confident that the portion of this decision dealing with Affiliated Ute is wrong, at least under the law of seven circuits, and it will change what this case looks like going forward.

But on the Comcast issue, there's no question that we're dealing with a situation where -- and there are other cases that I can talk to about the question of whether have there ever been a case involving varying inflation? Well, the Comcast case itself was a case

where the Supreme Court held that the damages theory did not match the liability theory, including because of the fact that there were issues with respect to how you -- how you calculate the damages.

A case that, I think, is a very important one, where we actually prevailed and our firm handled it, was the BP Securities litigation, which is 2013 Westlaw 638840, and this is at *17, Southern District of Texas, December 6th, 2013. And the Plaintiffs in that case -- and it didn't go to the -- it did not go to the Fifth Circuit, because this was at the District Court level -- the Court held that the damages methodology was insufficient, and that was a case where there were disclosures made by BP at various moments in time about safety with respect to oil rig situations.

And it was, obviously, different points in time when the disclosures were made and it was a case where, you know, you had sort of -- you have disclosures that were made before the spill and disclosures that were made after the spill. And the Plaintiffs -- the -- the Court held that you couldn't rely upon what's called the constant-dollar-damages methodology, which is what Plaintiffs are doing here, where they're essentially just looking at what was the stock price of the bidding in of the class period, what was the stock price at the

end of the class period, and saying, voilà, that's the damages. And since you have to take into account the varying inflation that occurs at moments in time and the constant-dollar approach, which was one of the methodologies that was adverted to in the, shall I say, like, two-page damage report that was put forward by Plaintiffs' expert did not, you know, rely -- it referenced that as being a potential method, but that method doesn't work when you have a case where you have different representations that are made over -- at different moments in time and you can't have constant inflation in a case like -- like this one, where, you know, it deals with, you know, alleged political acts that were all very contingent.

In the -- in the Beattie case, which was referenced, the Defendant failed to identify every -- any portion where there isn't challenging issues with respect to class, and that's at 2006 Westlaw 172207 at *4 (sic) and *9 -- let me read that back, because I was reading quickly. 2006 Westlaw 172207 at *7, *9.

And then a point that was raised, you know, I think which -- I think is an important one, is that, you know, what are the cases where Courts have held that classes can't be certified because of damages methodology hasn't been put forward but satisfies

Comcast. One is the BP case, which I dare say is a major, you know, issue in the world. I mean, a big -- a big securities case. And the second one is a case called Nypl versus JPMorgan. That's 2022 Westlaw 819771 at *7. That's Southern District of New York, March 18, 2022, and the Court dismissed in that case because a reliable damages methodology had not been proposed.

Now, in the -- let me go back to the Beattie case. In that case, that was a situation where, in filing the appeal for the 23(f) -- that was one of these cases where someone, I believe, filed -- you know, this was -- this was before the 23(f) had been granted, and the District Court said that it's seeking a stay. The Defendant had, quote, asserted that substantial questions are present because Courts of Appeals were, you know, and that -- and that they hadn't identified in the -- in moving for the stay, there wasn't -- there was a grant in that case, but the -- the problem was that the Plaintiff, unlike what we're doing, hadn't identified, well, what were the bases and how would the 23(f) petition, which was granted in the Beattie case, how would that affect the case going forward.

So I think of one of the things we certainly have done in this, you know, in this argument and in our papers is explain why we think the 23(f) could be

significant here, and clearly, since the Comcast issue is before the Sixth Circuit and could result in the decertification of the 10(b) claim, that's a real issue.

Now, on the issue of fact versus expert discovery, I think it would be a huge, huge, huge mistake to allow expert discovery to go forward in this case before we let the Sixth Circuit actually say whether -- that what sort of a damages methodology is necessary in this case. Makes no sense. Why wouldn't we wait for the Sixth Circuit to address that issue? Again, the Sixth Circuit took review on both issues. And, again, the Beattie case, the Plaintiff is not pointing out -- did not point out to the District Court -- the Defendants did not point out to the District Court why the 23(f) petition could significantly impact this -- the case, and I think Mr. Forge would have to concede that if -- if the Plaintiffs are unable to propose a damages methodology, and we might have to go back to Chief Judge Marbley and then back up to the Sixth Circuit, that could lead to the decertification of the Section 10(b) claim.

They may say, well, that's a wishful thinking by us, but it's still a real -- it's still a possibility and a reason why a stay should be necessary -- should be -- should be granted here.

Now, the beginning of Mr. Forge's argument, he talked about, oh, we're misstating what the cases are. Let me go through the law on this. In the Big Lots case, which is Magistrate Judge Jolson's case, the stay was granted, expert discovery as soon as the 23(f) petition was granted, and she wrote an opinion that you have. You -- that's cited by both sides. In that case, the Defendants did not object to doing the expert reports and filing -- and filing them. I think they may have already been done at that point, and so that's a different fact pattern than this case.

In the other two cases, which is BancorpSouth and a case called Tivity -- in that case, unlike this one, the 23(f) petition was granted, and then the case was remanded in the same order. So that the class certification error must have been so egregious that the Sixth Circuit said, well, we're remanding -- we're just sending it right back and -- and even at that point, okay, the District Court still granted a stay of proceeding.

Now, the case was back in the District Court, but -- but in that case, the District Court granted -- and this is BancorpSouth -- granted a stay of discovery pending the District Court's decision on class cert following remand.

Okay. So that would be us going to Chief Judge Marbley following a remand and asking for a stay. And in Tivity, the Court granted the stay, pending the outcome of the petition, and that was another case where there was a petition and it got remanded and then there was a stay.

There are cases which we cited, and let me give you those. Lannett, L-a-n-n-e-t-t, which is -- this is a case we cited in our -- in our brief, and then the other case would be IBEW Local 98. These are cases that are cited at page 4, Footnote 1, of our reply brief, along with others, where cases were stayed, in fact, discovery. The status of where the case is, is really not the question. The question is, is the case one -- and I think Mr. Forge is correct. Let's talk about the Beattie case.

Has the Defendant articulated reasons why the decision of the Sixth Circuit -- could the decision of the Sixth Circuit result in the decertification of the class here? The answer to that question is clearly true. In addition -- it's clearly true. And in addition, you know, that could have significant impacts on discovery, including who the parties are in the case and the like. I like Mr. Forge's example, what's your best case. Here's one for us. This is the Lannett

case, which I mentioned.

And that's a case where the Third Circuit after -- after a -- and I think this is where we can end up here potentially -- the Third Circuit stayed discovery pending a 23(f) appeal in a securities case in the middle of fact discovery after the District Court denied the stay, recognizing that, you know, in -- in these types of cases, where a 23(f) petition is addressing issues that go to the, you know, the central issues in the case, it makes sense to stay discovery. So we urge you to do that, but clearly to allow expert discovery to go forward here, when the very issue that's before the Sixth Circuit will impact the scope of expert discovery, what the experts might be doing and we might be back and forth to the Sixth Circuit several times on the expert reports and what's satisfactory and what's not, those wouldn't make any sense.

I recognize that, obviously, you know, Mr. Forge is for Plaintiffs. Plaintiffs want to keep push, push, push, push, push, but you still got to deal with the fact that a 23(f) grant in a securities case is a major event. And he hasn't cited any cases where, you know, Courts at least in -- in this district have just said, you know, go full-blown with fact discovery. It just so happens that this is the one where there's a

grant where we're in the middle of fact discovery.

So we urge -- we urge the Court to stay discovery where the case stands. We will represent that we will move as expeditiously as possible to brief this Sixth Circuit appeal, and we -- we want to get the case wrapped up just as much as Mr. Forge does.

SPECIAL MASTER JUDGE: Thank you.

Mr. Forge, I hesitate to ask, but any -- any brief rebuttal?

MR. FORGE: The only thing I would point out is a couple -- couple of additional mistakes. The VW case, Mr. Giuffra started out with a, you know, a lot of bluster about how that -- that's the case that proves that these mixed misrepresentation cases and omission cases categorically cannot be done under Affiliated Ute, and then he slipped up and acknowledged that what the Court's analysis turned on was whether it's primarily an omissions case or primarily a misrepresentations case, which is exactly what I said. I would point out that the VW case, I believe, there were nine pages of alleged misrepresentations in the complaint, and that is what convinced the Ninth Circuit that that was primarily and -- misrepresentation, a misrepresentations case, not an omissions case.

More importantly, the case went forward and

resulted in a multibillion dollar resolution. So, you know, more power to Mr. Giuffra if he wants to, you know, land this flight similarly to the VW case. The Beattie case -- initially, he said that the 23(f) was denied, but, again, thankfully, he corrected himself and acknowledged that the Beattie case, the Court denied the stay after the 23(f) was granted. And everything else, I think, is just him repeating earlier arguments that I've already responded to.

MR. GIUFFRA: Mr. Judge, can I just make one point, because I think it's important. In the VW case, it was the bondholder case, and in that case, the class was decertified, pending motion for summary judgment to dismiss the claim of the named Plaintiff. So I think this is the securities case, not the -- not the consumer class action. And so the winning on the Affiliated Ute effectively ended that case, because the only ground that the Plaintiff had tried to get class certified was Affiliated Ute. The Basic issue, they couldn't do because of the bondholder case, and there wasn't an efficient market for the bonds.

In addition, like in VW, like in this case, this is a case where there's 42 misstatements. When he started his argument, Mr. -- Mr. Forge talked about all the misstatements in the case, and so when cases were --

Plaintiffs are relying on, you know, 40 or more misstatements, you can't also bring a Ute case.

SPECIAL MASTER JUDGE: Thank you. Thank you both for your arguments. They were very helpful. The motion's taken under advisement. My report and recommendation will issue shortly, briefly, hopefully, soon.

Mr. Giuffra, do you want a -- do you need or want a break of any length before we jump into the opt-out case arguments?

MR. GIUFFRA: I'm happy to -- I'm happy to deal with it right now so we can get this all -- I mean, if you want to have a break -- if you'd like to have a break for a few minutes, that would probably be fine with me.

SPECIAL MASTER JUDGE: I'm fine. I have those documents teed up as well. I'm ready to jump into that. I think this will be very short, but I -- you know, I know we've been going for an hour and 24 minutes, and I don't know if you need a break or not.

MR. GIUFFRA: I can just keep going. It won't be -- it's not going to be a very long argument.

SPECIAL MASTER JUDGE: Please proceed.

MR. GIUFFRA: I think, you know, we also think the opt-out cases should be stayed. You know, the

opt-outs have, obviously, throughout this whole process sought the same discovery as the class action. They're participating in the same depositions, they're sharing discovery back and forth. Chief Judge Marbley made the sensible decision to set a schedule that had the class action going first and then the opt-outs going second.

The issues on the appeal will expect the opt-outs both alleged Affiliated Ute in terms of alleging reliance, and so that issue will be important in both cases, the citation for that. In the MFS complaint, it would be paragraphs 178 to 182; in Brighthouse, it's 166, 270.

In addition, the MFS and the Brighthouse Plaintiffs assert losses, the same losses as in the class case, and -- and so how the Sixth Circuit rules on what damages methodology is used to actually figure out damages will impact their cases as well, including on issues like loss causation.

So, you know, these cases have been tied together. It doesn't make any sense to separate them. The issues are largely the same, and so, I think, the same analysis applies to both.

SPECIAL MASTER JUDGE: Thank you.

Mr. Heimann, I know you've been waiting patiently. Your ball.

MR. HEIMANN: Oh, I hate to spill more metaphysical ink in these arguments, but the key point, I think, in response is we did not argue, as the Defendant apparently construed our brief, that we should not be stayed despite a stay in the class case. While I'm perfectly prepared or would be perfectly prepared to proceed forward with discovery, as I think we ought to, I don't think it's an efficient use of judicial resources, in the event that the class case were to be stayed, to allow our case to proceed. And so I would concede if, in effect, that if the class case is stayed for purposes of discovery, that our case should be stayed as well.

But I want to emphasize that I disagree completely with the notion that in the event Affiliated Ute were to be removed from the case, that would have any material impact on the discovery that would be taken in this case. I don't want to repeat what we said in our brief, but essentially, this case, the gravamen of this case is the contention that FirstEnergy engaged in a bribery scheme and concealed that scheme. In terms of interpreting that in terms of a 10b-5 claim, there are two theories that have been asserted by both the class and the opt-out case.

The first is the company made multiple

misstatements or statements, I should say, about its political contribution practices, and those statements were all expressly or implied to the effect that the company's political contributions were lawful and legitimate. And the assertion in the 10b-5 cases that those statements were uniformly false because, in fact, the company was engaged in making political contributions in a bribery scheme. In addition to that claim that the statements were false, both complaints also assert if those statements were misleading, because they failed to disclose the truth about the engagement in the bribery scheme.

So it is completely wrong for counsel to argue, as he did, that the case cannot be based on omissions. It can be based on omissions, it is based on omissions, in terms of a 10b-5 basic case for presumption of reliance, because we're asserting both of the statements were false and that they were misleading. And that means that the discovery that we had been taking and will take in the future is going to be exactly the same with respect to the basic questions in the case, whether Affiliated Ute is part of the case or not.

SPECIAL MASTER JUDGE: That goes to my earlier question that, you know, Chief Judge Marbley said that either the Affiliated Ute applies or Basic applies, but

it's just the application of the theory to the same underlying discovery; right?

MR. HEIMANN: Precisely.

SPECIAL MASTER JUDGE: Yeah, okay. Thank you.

Mr. Heimann, you get the gold star today for being concise.

MR. HEIMANN: Thank you.

SPECIAL MASTER JUDGE: Mr. Giuffra, any response?

MR. GIUFFRA: Other than I think what Mr. Heimann said, which is that, you know, how you rule on the class issue should determine how you rule on the opt-outs, we agree with that.

SPECIAL MASTER JUDGE: All right. That's easy enough. Thank you. I'm glad we didn't take a break.

The motions will be taken under advisement. If the parties would supply me, as you've done in the past, with a copy of the transcript, it will help me a great deal in getting the report and recommendation out. I hope to have a boatload of report and recommendations out and have gifts for everyone in the new year very quickly.

Any other matters that we need to attend to or discuss regarding these motions before we discuss last night's email exchanges? Mr. Giuffra?

MR. GIUFFRA: No.

SPECIAL MASTER JUDGE: Mr. Forge?

MR. FORGE: No. Thank you.

SPECIAL MASTER JUDGE: All right. Gentlemen, do you want this next portion to be on the record as well, or, I mean, we might as well if we have a court reporter here, I guess.

MR. FORGE: Yes. I think that's fine.

SPECIAL MASTER JUDGE: Yeah.

And, Lena, are you doing okay? Do you want a break?

THE REPORTER: I'm okay. Thank you.

SPECIAL MASTER JUDGE: All right. Thank you.

All right. Last night, I was copied on a series of communications regarding a possible proposed order that the parties were negotiating, which took me by surprise, since I came home from the Ohio State basketball game and found that this was being contemplated. And what made me laugh, as I came back from the game -- let me pull this up -- to finish my preparation for today, and I read that ECF No. 613, the last paragraph of which stated, in relevant part, the order appointing the Special Master did not delegate to Plaintiffs the authority to draft report and recommendations. Plaintiffs point to no authority

suggesting that they may draft judicial opinions for the Court or the Special Master. In fact, Courts repeatedly reject this practice as improper.

So explain to me why the parties are negotiating a proposed order to clarify an order that I don't think needs clarification.

MR. GIUFFRA: I think we were focused on there -- and, by the way, I was glad to see that -- glad to see that Ohio State won yesterday. So it was -- I went to Princeton. Princeton beat Rutgers too.

SPECIAL MASTER JUDGE: Nice.

MR. GIUFFRA: Yeah. But college basketball -- I actually prefer more of the NBA myself.

But -- but basically the -- the reference we're making is to the fact that the Plaintiffs, in the issue we're just dealing with, the stay application, had actually drafted up an opinion for you to write a report and recommendation, and we wanted to make the point that we thought that was improper. We're not saying you're going to do it. We just -- that was our way of dealing with it.

SPECIAL MASTER JUDGE: Right.

MR. GIUFFRA: The only issue we have to deal with now is not -- it's a stipulation of what we're proposing and then you just -- where you could sign it,

would be as, I think, we talked at the least hearing when -- when you entered your order on December 19th, which was a question about whether we had to meet and confer and whether things could be filed without your approval, and I raised at the December 21 hearing our concern that we didn't want that to be construed to prohibit Defendants from making a motion if, you know, we actually had a discussion with you and you said, "Why are you filing this stupid motion," and we wanted to do so anyway in order to make a record or preserve an issue for appeal, and then, you know, went back and looked at it, and you said -- and this is at page 43, and this is why it's good to have the transcript of that hearing on the 21st -- you said, quote, "We're going to let you file what you're allowed to file. We're going to let you file what you need to file. We're going to let you file stuff, even if you shouldn't file it and it's strategically dumb. We'll still let you do it, and you're going -- we're going to consider it because that's what I get paid to read it and make a decision best I can," close quote.

Now, after that, we then drafted something because there was concern on our end. We wanted to make sure it was actually in an order that we could file motions even to the extent they were authorized by the

federal rules, local rules, or the Court's orders. And all we wanted to do was to, you know, make it clear that we could do that. The deadline for us to, you know, file an objection to the order, which at least, on its face, seems to suggest that maybe, you know, we can only file motions, if the Special Master agrees, we can file motions is, I believe, next Tuesday.

And so we provided Mr. Forge a draft of this proposed, you know, order. He objected to it, but he did make certain concessions. I mean, what he sort of indicated was, which was sort of consistent with what you said, which is that if we're allowed -- authorized by the federal rules, by the local rules or the Court's orders, we can file something even if, following a conferral process, you don't think we should do it. And so we sent an email to him yesterday and said we were going to raise this issue at today's conference and, you know, that's -- that's really it. We just want to try to, you know, eliminate any question that our ability to file orders -- to file motions, excuse me -- that are allowed for under the federal rules, the local rules, or the -- one of the Court's orders can be filed, even if, you know, following the conferral process, you don't think that's a smart idea for us to file it.

The only case -- and I mentioned this the last

time -- from when I was a law clerk, and this was a long time ago, there is a very famous case called In Re Martin-Trigona, wherein there was a vexatious litigant and was filing complaints in, you know, all sorts of matters in New York, including in -- in divorce proceedings involving federal judges. And the Courts basically blocked him from filing any more motions without leave. That's, obviously, not what's going on here, and it would be a significant step to prevent a party from filing a motion that it was authorized to file under the federal rules because, during a conferral process, the Special Master said we couldn't do it. So that's all we wanted to clarify.

SPECIAL MASTER JUDGE: I think, in our previous status conference, I think I even indicated to you that I'm not going to declare you a vexatious litigator, even if it will shorten my paperwork. But, you know, gentlemen, the meet-and-confer without a -- don't file non-ministerial motions without leave of Court is to get you to talk to me. You know, I indicated in my prior order that, you know, after you meet and confer and talk to one another, you know, then we would talk and that you could file with leave of Court. You don't need to submit to me or should negotiate a proposed order or a stipulation in which I agree to follow the law. That is

sort of inherent in the job duties assigned to me by Magistrate Judge Jolson and Chief Judge Marbley.

As a Special Master, as I indicated, we are not -- it's not my job, it's not the Court's intent to prohibit you from filing anything. You know, this is the American court system. You could file whatever you want no matter how good, how bad, or how stupid. And it all gets considered. So you don't need that. I don't need to agree to it, because it could not be more implicit in the function of what we're doing here. I'm simply saying talk to one another first, talk to me. I may opine, you know, Counsel, that is the dumbest motion that any human being could ever file in a court case. Have at it. And I will -- I'm not going to tell you no, ever. Because you get to file and litigate your case how you want, but it's simply we're erecting a gateway so you talk to me before you file something.

MR. GIUFFRA: I think that obviates the issue.

SPECIAL MASTER JUDGE: Good. Thank you.

I did get a kick out of the email exchange and the attachments yesterday, and I thought, if nothing else, these gentlemen and these ladies are thorough, you know.

Mr. Forge, anything to add?

MR. FORGE: No. I never thought it was

necessary in the first place, just like you, so --

SPECIAL MASTER JUDGE: Oh, don't suck up. Don't suck up now.

MR. FORGE: I'm not. I didn't agree to it. This is not my idea, and I thought it was silly, and that's all there is to it.

SPECIAL MASTER JUDGE: You know, I think it's unnecessary, but I won't characterize it as silly, because I can see a cautious client saying, what the hell, we can't file something, and an attorney wanting to provide comfort. So --

MR. FORGE: Right. Although I do want to -- I do want to raise a related issue.

SPECIAL MASTER JUDGE: Yeah.

MR. FORGE: And -- and that is, you know, we do have a process in place that requires, you know, once we've met and conferred and then I think it's, you know, the following Monday, the proponent of, you know, that's seeking relief is supposed to provide a position paper. The opponent, by the next Tuesday, at close of business, is supposed to provide it -- their position, and then Wednesday the two are combined and submitted to you. And I -- the one thing I don't want to do is abandon that, because that enables -- that is a written submission. That -- you know, that enables us to

present issues, not just for your blessing to file, but hopefully for resolution.

SPECIAL MASTER JUDGE: Yeah.

MR. FORGE: Obviously, either side could -- you know, whatever side is disappointed could file an objection, but at least -- but we would get, you know, the hope is -- and I think the reason why Magistrate Judge Jolson instituted this originally and then you adapted it into your mandate -- the hope is that these issues can be resolved quickly, not -- not so we have to set up briefing schedules and, you know, initial motions and oppositions and reply briefs and do all of that. The hope is that we can resolve these quickly without having to go through that full-blown process.

So the only -- my only comment is I don't want to abandon that process, and I don't want -- I don't want this -- us to, you know, just kind of default into this new procedure, where FirstEnergy sends you a letter and then we talked and you say, well, it doesn't seem like a good idea, but they just go ahead and start a five-week briefing process on a motion that could have been resolved in two days.

SPECIAL MASTER JUDGE: No. The ideal in my thought is, you know, eventually, I think that our status conferences, you know, whenever there is no stay

in effect, whether it's sooner or later, our status conferences will not necessarily be needed on a weekly basis.

When we're going to have one, I want written submissions by the parties, teeing up for me what the agenda would be and what the positions are so we can have a productive -- most productive conference. In the interim, whenever things are either in the off weeks or whenever something comes up that's not on that scheduling that's more of an emergency, just pick up the phone then. But if everybody starts abusing the phone privilege, then we're going to have to have -- you know, just use common sense, but I like the written agenda, the written submission, and we're not going to abandon that, because it's helpful for me, it was helpful for Magistrate Judge Jolson, and, you know, it's helpful just for keeping everything straight in my mind and probably your minds as well. So look at the leave of Court thing as supplementing that, certainly not replacing it.

MR. FORGE: Okay.

MR. GIUFFRA: We agree that efficiency is important, and we should, you know, try to eliminate all the -- any unnecessary filings and papers.

SPECIAL MASTER JUDGE: Great. Good. I like

it.

All right. Ladies and gentlemen, I think I have more research to do and quite a bit of drafting to do. Let's keep, at least tentatively, next week's conference on the books, because if nothing else, we may have the aftermath of some orders to discuss. It will be subject to being canceled, if it proves unnecessary. If anything comes up in the meantime, in the interim, certainly reach out to me, as our usual course, and we will have an emergency contact, as necessary.

Please get the transcript to me as soon as possible, and I will get busy drafting, so you guys can get some decisions here, and report and recommendations upward on the food chain.

MR. FORGE: Thank you.

MR. GIUFFRA: Thank you very much.

SPECIAL MASTER JUDGE: Thank you, all, for your work today.

We are off the record.

(The proceedings concluded at 9:42 A.M.)

* * *

STATE OF CALIFORNIA)
) ss.
COUNTY OF ORANGE)

I, Lena Mescall, Certified Shorthand Reporter, Certificate No. 13018, for the State of California, hereby certify:

I am the person that stenographically recorded the transcript of proceedings held on Thursday, January 4, 2024.

The foregoing transcript is a true record of said proceedings.

Dated: January 5, 2024

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